

CADDELL

April 14, 2019

NAVFAC FOIA Officer
Mr. T. Bestafka
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Ref: Nuclear Power Training Facilities
Naval Weapons Station, South Carolina
Contract № N69450-14-C-1756
Prime Contractor: Caddell Construction Co. (DE), LLC

Sub: Appeal of Decision, FOIA Request DON-NAVY-2019-005755

Dear Mr.

Please consider this submission an appeal of Naval Facilities Engineering Command Southeast's (the "Navy") adverse determination on Caddell's FOIA request (DON-NAVY-2019-005755) provided in the Navy's August 2, 2019 letter (signed by T. Bestafka). Caddell disagrees with the Navy's decision and rationale provided in its letter, and it is Caddell's position that this request is proper and the Navy's decision was unjustified, as discussed below.

This FOIA request is related to the Nuclear Power Training Facilities, Naval Weapons Station, South Carolina, Contract No. N69450-14-C-1756 ("the project"). The project is approaching completion but is not complete. In 2018, the Navy's team administering this project ("NAVFAC") de-scoped a portion of Caddell's scope of work, known as Building 2314. NAVFAC requested a proposal from Caddell for the value of the credit to be provided back to NAVFAC for the deleted Building 2314 work. Caddell gathered the necessary information (including its subcontractors' proposals) and provided a detailed and supported proposal to NAVFAC for review. Caddell's proposal is Attachment 1 and is submitted with this narrative. For reasons unknown to Caddell, NAVFAC rejected Caddell's proposal without explanation or discussion, and instead opted to prepare its own quantification of the value of the credit evidently based on NAVFAC's own investigation and collected estimates and facts. NAVFAC then unilaterally set the value of the credit via contract modification P00004 ("Mod P00004"), but did not provide a calculation, breakdown, detailed explanation, or any form of supporting information for its unilateral decision. Mod P00004 is Attachment 2. Through project communications, Caddell requested NAVFAC to explain the basis for the unilateral decision; NAVFAC refused to provide it. Through its FOIA request, Caddell formally requested information regarding the calculation and data NAVFAC used in reaching its decision, but NAVFAC refused to disclose *any* information, on the assertion that NAVFAC's quantification was a "pre-deliberation determination."

It is unreasonable and untenable for the Navy to refuse to provide even basic factual information to Caddell related to the Navy's one-sided decision to take away from Caddell a large portion of work worth a substantial dollar value. Without a doubt, such factual information exists related to this NAVFAC decision. The law is well settled that the Navy may not hide behind FOIA exemption 5, evidently relying on the deliberative process privilege, to shield such factual information from disclosure as discussed below.

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NAVFAC's Mod P00004 shows that such factual information exists and is currently being withheld by the Navy. NAVFAC did give an overview in Mod P00004 of some of its procedure purportedly used in quantifying the deductive change. For example, the modification stated that NAVFAC had compared "the original government estimate for Building 2314 work, the congressionally authorized amount for Building 2314, and Caddell's cost-loaded schedule for Building 2314 work" as part of the quantifying effort. By NAVFAC's own admission, these are documents containing factual information that were authored long before NAVFAC began deliberating on what value it would give itself for the deletion of Building 2314 from the work. And as such, these documents could not contain advisory opinions or recommendations related to the Navy's deliberative process, and are thus not "predecisional". See *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 10 (D.D.C. 2004). Further, these documents were the raw data which NAVFAC considered as a part of its decision process. These documents, and others like them containing factual information without recommendations or opinions inextricably interwoven into the facts, cannot fall within the protections of FOIA exemption 5. See *id.* at 14; *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 169 (D.D.C. 2017).

Mod P0004 also discusses investigations conducted by NAVFAC into "current market conditions" and collection of "estimates accompanying a design for similar repurposing work." This modification goes on to describe an investigation by the Contracting Officer's representative that "captured the results from...working with Caddell over a 4-month period in an attempt to obtain sufficient backup documentation to justify the credit quotes from Caddell's subcontractors," and also notes NAVFAC visited "storage facilities to validate materials actually procured for the Building 2314 work." These investigative efforts were conducted as part of a routine contract administrative process for a construction project. All of this points to a substantial amount of factual information that is not deliberative and must be released. See *Hardy*, 243 F. Supp. at 164-175. Yet, without justification or explanation, the Navy has refused to fulfill its FOIA obligations.

Without a doubt, all of this information would be subject to discovery in litigation related to the question of whether NAVFAC's quantification of the credit was proper. And, as defined in the FOIA exemption 5 provision, such information should be disclosed accordingly.

The Navy's letter noted above also references that this information may be used to review currently pending requests for equitable adjustments submitted by Caddell. This is an untenable assertion. The documents Caddell has requested only relate to the Building 2314 scope deletion and are wholly separate from the issues in Caddell's other REAs. There is no relation between those pending REAs and Claims and the Building 2314 de-scope.

The Navy's decision to withhold all information pertaining to the de-scope of Building 2314 is unjustified under any FOIA exemption, and is wrongful. Accordingly, Caddell hereby appeals the Navy's adverse determination on Caddell's FOIA request.

Caddell also requests the Navy provide a "Vaughn index" itemizing each withheld document with a specific FOIA exemption and the relevant part of the Navy's nondisclosure justification. Caddell asks the Navy to provide the index in good faith before the need for filing suit arises in the hopes that such a dispute can be avoided.

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Moreover, Caddell again respectfully demands that the Navy provide any segregable documents, and any segregable portions of any documents, from those documents the Navy claims are “pre-decisional” as required by 5 U.S.C. § 552(b).

If there are any questions please do not hesitate to contact us.

Very Respectfully,



James A. McKay
Construction Executive

cc: 1040 MGM

Attachments:

1. Caddell's proposal for the deletion of Building 2314
2. Unilateral Modification P00004